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No. 595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

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QUESTIONS PRESENTED.

1. Whether Petitioner Violated Section 8(a)(5) of the National Labor Relations Act by conditioning its willingness to enter into a collective bargaining agreement upon the Union's assent to a provision that no grievance may be processed by the Union unless the individual employee or employees involved signify their consent to the Union's doing so by signing a statement of the grievance.

2. Whether Petitioner violated Section 8(a)(5) of said Act by unilaterally withdrawing top seniority from Union stewards and other representatives, and by abolishing the contractual grievance and arbitration procedure, prior to an impasse in then pending collective bargaining negotiations, and without giving the Union adequate notice of, and opportunity to negotiate about, such changes in conditions of employment.

Whether Petitioner violated Section 8(a)(5) of said Act by unilaterally imposing upon all of its employees the proposed terms and conditions of employment demanded by it during collective bargaining negotiations, where the Board found that during such negotiations the Petitioner had violated Section 8(a)(5) and had persisted in such violation until the date of such unilateral action.

COUNTER-STATEMENT OF THE CASE.

A petition for certiorari in this case, directed to the United States Court of Appeals for the Third Circuit, was filed on October 31, 1963, by Bethlehem Steel Company (Shipbuilding Division), hereinafter referred to as "Bethlehem". Despite the fact that this petition raises relatively narrow questions of law concerning the statutory duty to bargain—questions to which, as we shall see, both this Court and the courts of the various circuits have repeatedly given the same answers—Bethlehem, obviously seeking to posit a factual context in which these judicial determinations can be overruled, has presented a Statement of the Case which so distorts the instant record as to impel us to submit this counter-statement.[1]

In the summer of 1959, the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (hereinafter referred to as "Union") entered into negotiations with Bethlehem for a new collective bargaining agreement to succeed its then effective collective bargaining agreement with Bethlehem, which, by its terms, was to expire on July 31, 1959. (Since this agreement was executed in 1956, we shall hereafter sometimes use the phrase "the 1956 contract" in referring to it.)

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[1] Bethlenem's methodology in effecting this distortion is the familiar one of stating, as if they were findings of facts, matters which are either not part of the record or which are conclusions reached by Bethlehem, but by no one else. Some examples are: (1) Bethlehem's statement that three of its East Coast shipyards have closed (Petition, p. 4); (2) that foreign and domestic competition had—impliedly, since Bethlehem's last preceding negotiations with the Union, in 1956—reduced Bethlehem's volume of business and that Bethlehem was at a competitive disadvantage in relation to other American shipyards (what were the facts in these regards were sharply disputed issues in this case, which were not determined by findings of fact) (Petition, pp. 5 and 7); (3) that the negotiations came to a halt by August 6, 1959 (Petition, p. 7); (4) that the Union's contract proposals would have interfered with "operational efficiency" (Petition, p. 7); etc., etc.

These negotiations began on July 7, 1959, on which date the Union orally outlined the changes which it desired to be incorporated into the agreement (24a; 541a, par. 14).[2]

On the next day, July 8, 1959, following an oral presentation by Bethlehem's chief negotiator of a printed statement reciting Bethlehem's view of the shipbuilding industry's allegedly bleak economic outlook (24a-26a; 293a; 541a, par. 13), Bethlehem delivered to the Union negotiators a written, detailed description of Bethlehem's proposed changes in the 1956 contract (686a-743a). This statement concluded with the announcement that Bethlehem was willing to negotiate *language* acceptable to the Union but that no compromise was possible as to the *substance* of Bethlehem's proposals (742a-743a; see also third par. on p. 6 of Bethlehem's Petition for Certiorari). Later in the negotiations, on August 3, 1959, Bethlehem presented to the Union and mailed to each of its hourly-paid employees a booklet containing a copy of the collective bargaining agreement as it would read with the incorporation therein of Bethlehem's proposals for changes (762a-841a). This booklet and Bethlehem's proposals incorporated therein came to be called by the parties the "White Book" and we shall hereinafter sometimes use that name in referring to Bethlehem's proposals.

It is not disputed that Bethlehem undeviatingly insisted, throughout all of the negotiations, on obtaining the Union's agreement to each and every provision of this White Book,[3] *some* of the effects of which would have been the following:

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[2] In this brief, references to the pages of the Joint Appendix filed with the lower court are indicated by "a". References to the lower court's opinion, which is reproduced in Appendix A to Bethlehem's Petition for Certiorari, will be designated by "App.".

[3] Bethlehem's chief negotiator pungently described Bethlehem's determination to obtain the White Book as the new collective bargaining contract: "We put it on the table and that's it" (173a). Other record references disclosing Bethlehem's "take it or leave it" attitude toward its proposals may be found at 154a-155a; 157a; 159a; 301a; 314a-316a.

(a) Invalidation of all past practices and arbitrators' awards interpreting contract language (14a; 118a; 122a; 225a; 298a; 691a, Section 1).

(b) A freeze on wages for one year, a freeze on the insurance and pension programs for three years, and deletion of the provisions for "Cost of Living Adjustment" (19a; 773a, Article V).

(c) A grant to Bethlehem of such freedom to assign work to employees out of their respective crafts, and of the right to "schedule off" employees, irrespective of seniority, for an unlimited number of ten-day periods as to result, to quote from the Trial Examiner's Intermediate Report, in "a virtual elimination of seniority in the usual sense" (70a; 793a, last par.-794a; 825a, Article XXII; 790a-791a).

(d) Severe limitations on an employee's right to "call-in pay" (20a; 300a; 779a, Section 1(b)).

(e) The imposition of restrictions on the grievance procedure so severe as to formalize that procedure, in violation of past practice between the parties and of universal industrial practice in this nation, into one burdened by legalisms of common law procedure and by rules of common law pleading (16a-17a).[4]

In addition, and significant to the issue of Bethlehem's conduct in the negotiations when judged by the standards

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[4] Even the Trial Examiner in his Intermediate Report, which substantially exculpated Bethlehem from any violations of the Act, felt impelled to make the following comment on the White Book: "What was really shocking—as the Union immediately reacted—about the Company's proposals in 1959, was that it demanded back, in one fell swoop, many of the piecemeal benefits, which over the years, it had yielded pursuant to periodic demands by the Union . . . all of a sudden the Company sought to recapture many of its previous grants" (71a).

of Sections 8(a)(5) and 8(d) of the Act. Bethlehem proposed, and insisted on the proposal, "that before the Union could process a grievance it [the grievance] must be signed by the individual employee or employees involved" (17a). (Bethlehem's Petition for Certiorari refers to this proposal as its "grievance-signing proposal" and we adopt this phrase when referring to it herein.)

After Bethlehem's July 8 presentation of its proposals, the parties adjourned the negotiations until July 15, in order to give the Union an opportunity to study Bethlehem's proposals.

At the negotiation session held on July 15, 1959, the Union advised Bethlehem that study of the White Book had caused the Union negotiators "shock and amazement" (108a). In the afternoon session of July 15, the Union distributed mimeographed copies of its proposals, summarized them and briefly gave its reasons in support of them (541a, par. 14).

At the next negotiation session, Bethlehem's chief spokesman stated that Bethlehem's answer to all of the Union's proposals, outlined but the day before, was a "flat, absolute and uncompromising no" (55a; 116a; 127a).

After this "flat, absolute and uncompromising no", the parties commenced a review, characterized by very little discussion of the issues (164a-167a; 176a; 222a; 324a-325a), of their respective proposals as they affected the successive articles of the 1956 contract (26a). During this review, Bethlehem's negotiators refused to offer any explanation as to the reasons for any one of its proposals but, when questioned by the Union concerning these reasons, took refuge in the rejoinder, stated and restated by Bethlehem's chief negotiator, that "I think we covered that in our opening statement" (131a-132a; 166a-167a).

This review of the parties' proposals continued until July 28, 1959, when Bethlehem, during the afternoon session of

that date, announced to the Union, without any bargaining on the question, that, effective as of August 1, Bethlehem would no longer give effect, inter alia, to the provisions of the 1956 contract respecting (i) the "top seniority" afforded to Union officials and stewards, and (ii) the provisions setting forth the grievance and arbitration procedures. On August 1, 1959, Bethlehem unilaterally effectuated this announcement (34a; 543a, par. 21).

The article by article review then continued through negotiation sessions conducted on August 2, 6 and 7. At the meeting of August 11, 1959, Bethlehem made another announcement to the Union, viz., since the bargaining had, in Bethlehem's opinion, reached an "impasse", Bethlehem had determined to put into effect, on August 13, 1959, despite the Union's lack of agreement thereto, all of the provisions of the White Book (160a; 545a, par. 25; 843a-847a).* On August 13, Bethlehem, true to its word, carried out its threat and unilaterally imposed the terms of its White Book upon the 18,000 employees represented by the Union in the negotiations (36a; 545a, par. 27).

Since the article by article review had not neared completion by August 13, 1959 (despite Bethlehem's allegation of an "impasse"), the parties continued their negotiations in sessions conducted on August 19, September 1, 16, 25, 29, 30 and October 14 (539a-540a, par. 10a).

In addition to the facts set forth in the foregoing chronological outline of the negotiations in issue, other facts are

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* That Bethlehem had, either prior to or at the very outset of the negotiations, devised the legal defense of an alleged impasse for its determination not to budge from its White Book and not to grant any of the Union's proposals, but unilaterally to impose the White Book as quickly as possible, is seen from the fact that one of Bethlehem's negotiators testified in another proceeding that the parties had been at an impasse since July 16, 1959, the date of their fourth negotiation session and only eight days after the beginning of negotiations (321a-322a).

revelatory of the parties' respective conduct *vis-a-vis* the Act's injunction of good faith bargaining. Some of these facts are the following:

(a) The Union offered, on July 28, 1959, to extend the 1956 contract, which was to expire on July 31, 1959, for thirty days, so as to relieve the pressure which the impending expiration imposed on the bargaining (64a; 145a-146a; 542a, par. 16). With no pause for consideration, Bethlehem's negotiators rejected this proposal (145a; 542a, par. 16).

(b) On August 6, the Union offered that the proposals of both parties be submitted to binding arbitration by a qualified third party. It took Bethlehem but a luncheon recess to decide to decline this proposal (64a; 156a; 305a-306a; 545a, par. 24).

(c) The Union repeatedly proposed that outside persons be consulted for the purpose of advising the parties as to the propriety of certain of their respective proposals, or to suggest more fruitful bargaining procedures. Bethlehem's negotiators either failed to respond to these suggestions to facilitate the bargaining or expressly rejected them (64a; 118a; 148a; 156a; 171a-172a; 322a-323a).

(d) The Union continuously indicated its willingness to compromise, if Bethlehem would itself indicate some willingness to recede from its demand that the *whole* of the White Book (including the grievance-signing proposal) be adopted as the parties' new collective bargaining agreement (140a; 175a; 236a-237a; 262a; 289a; 295a). Bethlehem, however, never indicated such willingness, never budged from its demand for the whole of the White Book, and continuously insisted that, "Our solutions [those found in the White Book] are the only solutions" (157a).

Throughout its Petition, Bethlehem places great reliance upon findings of fact made by the Trial Examiner. In this case, as we point out under Point III below, the decision of the lower court did not attempt to alter any of the Board's findings of fact, but accepted those findings; on the basis of the Board's legal conclusions, however, the court below arrived at a different legal conclusion from that reached by the Board respecting Bethlehem's unilateral actions of August 13. We cannot refrain from pointing out, however, that Bethlehem's heavy reliance on the Trial Examiner's findings of fact is misplaced for two reasons: (i) The Board itself, in its original Decision and Order, stated that it was adopting the Trial Examiner's conclusions, "without completely agreeing with all his subsidiary findings" (84a), and did not withdraw this statement in its Supplemental Decision and Order, despite the dissent of Member Rogers (95a). (ii) A vivid example of the unreliability of those of the Trial Examiner's findings of fact which Bethlehem reiterates throughout its Petition is furnished by paragraphs (a) through (d) above, which are utterly inconsistent with a finding that the Union evinced "fixed and stony inflexibility" to all of Bethlehem's proposals; that the Union unequivocally declared that all the Company's demands are absolutely unacceptable; that the Union had refused to make any concessions; and the like (Petition, pp. 24, 14, 18, 20, 25). The Board's acceptance of the lower court's remand of this case clearly indicates that the Board desires an opportunity to review, among other things, those "subsidiary findings" of the Trial Examiner, which it has thus far not approved.

Finally, the truth of our foregoing description of Bethlehem's conduct in the negotiations—as opposed to the "facts" set forth in Bethlehem's Petition—and Bethlehem's misplaced reliance on the Trial Examiner's findings of fact are established by judicial descriptions of Bethlehem's conduct

enunciated in cases ancillary to the instant litigation. In *Bethlehem Steel Co. v. Kehoe, et al.*, In Equity, No. 76496, 43 Labor Cases, ¶50,373 (1960), the Superior Court of Massachusetts declined Bethlehem's prayer for an injunction against alleged mass picketing at its Quincy, Massachusetts, shipyard and, in the course of its opinion, said the following:

> ". . . The Company's proposals took out of most of the somewhat similar contracts of shipbuilding corporations on the East Coast matters favorable to management and omitted conditions favorable to labor. No shipbuilder on the East Coast has a contract containing provisions similar to those in the Company's proposals. The acceptance of the Company's proposals would place the Company in a substantially better competitive position than any other shipbuilder on the East Coast. We find that this indicates that the Company, in this respect, has failed to make every reasonable effort in good faith to settle the dispute by negotiations."

And in *Bernard L. Alpert, etc. v. Bethlehem Steel Co., etc., et als.* (Civil No. 60-217-S, 1960), Judge Sweeney of the United States District Court of Massachusetts thus described Bethlehem's "bargaining" with this Union in 1959:

> ". . . I find that there is reasonable cause to believe that from the outset the Company had no intention of bargaining with these Unions [sic] in the commonly accepted meaning of the word. It had closed its mind to anything other than a contract based on the terms of the 'White Book' which it had on July 8th outlined to Labor. In all of the meetings thereafter the Company refused in effect to discuss any retreat from the position that it took in the 'White Book' on the many clauses of the contract. The Company had a 'take it or

leave it' attitude, and in spite of all its protestations of good faith, that attitude persists to this moment and precludes bargaining within the meaning of the Act and within its normal connotation. . . ."

ARGUMENT.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT BETHLEHEM'S INSISTENCE ON ITS GRIEVANCE-SIGNING PROPOSAL THROUGHOUT THE ENTIRE NEGOTIATIONS WAS A VIOLATION OF THE ACT.

At the outset, in light of the statements in Bethlehem's Petition, it should be made clear what the holding of the Trial Examiner, the Board and the Court of Appeals was concerning Bethlehem's grievance-signing proposal. This holding was not, as stated by Bethlehem (Petition, p. 11), that "the Company committed an unfair labor practice by its grievance-signing proposal". As even a cursory examination of all of the decisions in this case makes clear, the Trial Examiner, the Board and the Court of Appeals each held that Bethlehem violated Section 8(a)(5) by *undeviatingly insisting, during the entire course of the negotiations*, on obtaining the Union's assent to its grievance-signing proposal—a proposal which constituted a non-mandatory subject of bargaining—as a precondition to entering into a new collective bargaining contract. The Trial Examiner

(51a-52a), the Board (83a-84a; 88a) and the Court of Appeals (App., p. 6) each relied upon this Court's decision in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958), as authority for this holding. Accordingly, we shall now discuss that case.

The *Borg-Warner* case, we submit, is correct authority for the proposition that Bethlehem's grievance-signing proposal constituted a non-mandatory subject of bargaining, i.e., a subject not embraced by the list of bargaining subjects set forth in Section 8(d) of the Act, and that, accordingly, Bethlehem's tenacious insistence upon obtaining this proposal violated Section 8(a)(5).

The portion of the *Borg-Warner* opinion relevant here is the consideration given by the Court in that case to the employer's insistence upon obtaining a "ballot clause" in its collective bargaining contract with the union. The ballot clause proposed by the employer provided that the union would not be free to call a strike without first affording to the members of the bargaining unit it represented "an opportunity . . . to vote, by secret . . written ballot on whether to accept or reject the Company's last offer . . ." (*Borg-Warner*, p. 345).

This Court held that such a proposal, while lawful and enforceable if agreed upon by the parties, constituted a non-mandatory subject of bargaining and, hence, a proposal upon which the employer could not lawfully condition its willingness to execute a collective bargaining agreement.

In the course of its opinion, this Court succinctly set forth, at page 350, those characteristics of the ballot clause which distinguished it from a typical no-strike provision, so as to take the clause out of the list of mandatory bargaining subjects enunciated in Section 8(d):

> "The 'ballot clause' . . . deals only with relations between the employees and their unions. It substantially

> modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative."

The court below correctly apprehended, as did the Trial Examiner and the Board, that the failings in the *Borg-Warner* ballot clause proposal and in Bethlehem's grievance-signing proposal, which prevent those proposals from being mandatory subjects of bargaining, are identical. Thus, Bethlehem's grievance-signing proposal "substantially modifies the collective bargaining system" provided for in the Act, since it prevents the Union from processing grievances that may affect all of the employees in the bargaining unit, unless the Union can prevail upon an individual employee to sign a written statement of the grievance. It is obvious that a contract provision having this effect deprives a certified union of its rights under Section 9(a) of the Act as the exclusive bargaining representative for the whole of the bargaining unit it represents.[6]

Another inherent effect of the grievance-signing proposal makes it clear that that proposal is even more offensive to the policies of the Act than is the "ballot clause" which

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[6] This may be exemplified by one hypothetical case, setting forth an everyday occurrence in industrial relations, viz., an employer, knowing a given employee desires promotion to supervisory status, requests that he work a few hours overtime at straight-time rates. The individual employee, desiring to court favor with the employer, willingly accedes to the request. Under a grievance-signing provision, the union, in these circumstances, could not protest this basic violation of a collective bargaining agreement calling for "time-and-a-half" for overtime, unless the employee signed the grievance. The union's impotence in this situation would, of course, severely undermine its status as bargaining representative, duty bound to enforce, for the benefit of all employees in the bargaining unit it represents, the wage provisions of the agreement.

was in issue in *Borg-Warner*. That effect is that, under a contract containing such a provision, individual employees would be subjected to a vivid sense of fear that by making it possible, by means of their signature, for the union to prosecute a grievance, they would incur the displeasure and reprisals of their supervisors. Moreover, this effect is obviously the precise one intended by Bethlehem. This is seen from Bethlehem's principal rationale for its proposal, namely, the need "to identify claimants and to prevent the grievance procedure from being misused as an instrument to harass the management" (Petition, p. 9). Of course, no signature on a grievance form is necessary "to identify claimants". The practice of the parties under the 1956 contract identified the grievants as well as the grievance-signing proposal ever could do. That practice was for each grievance to bear the name, though not the signature, of the aggrieved employee; only the Union's steward signed the grievance form (312a). Accordingly, the grievance-signing proposal was not needed to identify grievants, but was needed to prevent "harassment" by use of the grievance procedure and would have fulfilled this purpose by intimidating employees to the extent that few, if any, grievances could be filed by the Union even in the most meritorious cases. Thus, the proposal would destroy the Union's rights and its effectiveness as the employees' certified bargaining representative.

Accordingly, the strictures of this Court in the *Borg-Warner* case concerning the ballot clause are perfectly applicable to Bethlehem's grievance-signing proposal.

At page 14 of its Petition, Bethlehem attempts to avoid the foregoing conclusion on the ground that its "insistence" upon this proposal was a "minor matter in the bargaining". There are two answers to this contention.

First, this Court, in the *Borg-Warner* case, held that, as a matter of law, such a violation of the Act—insistence by a party upon a non-mandatory subject of bargaining—is such a "serious matter" as to constitute, in and of itself, a violation of Section 8(a)(5). This Court's description of the evil inherent in a party's insistence upon a non-mandatory subject of bargaining suffices as answer to Bethlehem's contention that its grievance-signing proposal was a "minor matter". At p. 349 of the *Borg-Warner* decision this Court said the following:

> "We agree with the Board that such conduct [insistence upon a non-mandatory subject of bargaining] is, in substance, *a refusal to bargain* about the subjects that are within the scope of mandatory bargaining." (Emphasis supplied.)

Second, the uncontradicted record in this case establishes that the grievance-signing proposal was one of the major issues in the negotiations. The Union repeatedly expressed its unwillingness to agree to this proposal. Bethlehem adamantly insisted upon obtaining it in the new contract. Indeed, the negotiations floundered on Article XIX of the White Book—the Article containing the grievance-signing proposal—for day after day during the negotiations (169a-170a; 312a-314a). In addition, Bethlehem's prior experiences with this Union were enough to put Bethlehem on notice that the Union would never agree to such a proposal. A proposal of similar import had been made by Bethlehem in the 1947 negotiations with this Union. The result of Bethlehem's insistence upon this proposal in 1947 was the filing by the Union of an unfair labor practice charge, which, in turn, resulted in the Board's decision finding Bethlehem guilty of a violation of Section 8(a)(5), in *Bethlehem Steel Company*, 89 NLRB 341. Accordingly, Bethlehem obviously

knew that its grievance-signing proposal was bound to meet with the Union's strenuous opposition—as, indeed, it did (169a-170a; 264a-265a; 312a-314a)—and the record establishes that this opposition, in large measure, prevented agreement between the parties.

Bethlehem's final contention concerning the violation of Section 8(a)(5) committed by it in insisting upon the grievance-signing proposal, amounts to no more than a plea that this Court now undertake to overrule its *Borg-Warner* decision. At page 15 of its Petition, Bethlehem opines that *Borg-Warner*, and, hence, the opinion of the Court below in this case, contravene the philosophy expressed in *NLRB v. American National Insurance Co.*, 343 U. S. 395 (1952), by requiring that parties exclude certain subjects from discussion in the course of collective bargaining negotiations. This, of course, is not the case.

As seen from the explicit language of Justice Burton in *Borg-Warner*, nothing in that case implies "that bargaining is to be confined to the statutory subjects" (*Borg-Warner*, p. 349). Parties are, accordingly, free to enter into discussion, and even agreement, concerning non-mandatory subjects of bargaining, if they so desire. Indeed, discussion of such subjects, short of unyielding insistence, can serve as valuable aid in reaching agreement, since non-mandatory subjects of bargaining can often be agreed upon in the "trading-off" process which normally accompanies good faith bargaining.

Moreover, Bethlehem's alleged fears concerning the deleterious effect of *Borg-Warner* and of the instant case upon our system of collective bargaining are laid to rest by the history of collective bargaining since the *Borg-Warner* decision. Countless collective bargaining agreements executed subsequent to *Borg-Warner* contain provisions respecting performance bonds, industry advancement programs, ballot

clauses, grievance-signing requirements and other non-mandatory subjects of bargaining.[7]

It is thus seen that Bethlehem's purported fears are groundless. The grievance-signing proposal is a non-mandatory subject of bargaining. The Trial Examiner, the Board and the Court of Appeals each correctly applied *Borg-Warner* to the facts of this case and Bethlehem has presented no compelling reasons why, in this case or in any other case, *Borg-Warner* should be overruled. Accordingly, this phase of our case clearly does not justify grant of certiorari.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT BETHLEHEM VIOLATED THE ACT ON AUGUST 1, 1959, BY UNILATERALLY ABOLISHING THE GRIEVANCE PROCEDURE AND THE "TOP SENIORITY" PROVISIONS OF THE 1956 CONTRACT.

As we have seen, on July 28, 1959, Bethlehem announced to the Union negotiators that on August 1 it would discontinue giving effect to the entire grievance procedure—including the provisions for arbitration—of the 1956 contract; and to the provisions therein affording top seniority to Union officers and stewards. On August 1, Bethlehem did so. That this unilateral alteration by Bethlehem of its

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[7] **Painters, Local 164 v. NLRB**, 293 F. 2d 133 (CA. DC, 1961); cert. den., 368 U. S. 824 (1961) (performance bonds); **Detroit Resilient Floor Decorators v. NLRB**, 317 F. 2d 269 (6th Cir., 1963) and **Metropolitan District Council of Carpenters**, 137 NLRB 1583 (1962) (industry advancement program).

Indeed, at page 13 of its Petition, Bethlehem itself states that provisions similar to its grievance-signing proposal are common to many collective bargaining contracts.

employees' terms and conditions of employment constituted an unfair labor practice is so well established under the decisions of this Court, of the Courts of Appeals of the various Circuits and of the Board itself, that only Bethlehem's rather unique contentions as to non-violation require us to comment on this holding of the Board and of the court below. First, however, let us briefly establish what the law in this connection is.

Provisions respecting "top seniority", viz., preferential seniority status, constitute "terms and conditions of employment" within the meaning of Section 8(d) of the Act. *NLRB v. Proof Co.*, 242 F. 2d 560 (4th Cir., 1957); see also *Aeronautical Lodge v. Campbell*, 337 U. S. 521 (1949). Provisions respecting grievance procedures constitute "terms and conditions of employment" within the meaning of Section 8(d) of the Act. *NLRB v. Ross Gear & Tool Co.*, 158 F. 2d 607 (7th Cir., 1947).[*] Accordingly, an employer's unilateral alteration or abolition of these terms and conditions of employment, prior to impasse, necessarily means that the employer refuses to bargain further concerning these subjects. This Court's cases unanimously so hold. *May Department Stores v. NLRB*, 326 U. S. 376 (1945); *NLRB v. Crompton-Highland Mills*, 337 U. S. 217 (1949); *NLRB v. Katz*, 369 U. S. 736 (1962). The decisions on this head of the Courts of the various Circuits are also unanimous. *NLRB v. Proof Co.*, supra; *NLRB v. Valley City Furniture Co.*, 230 F. 2d 947 (6th Cir., 1956); *NLRB v. Century Cement Mfg. Co.*, 208 F. 2d 84 (2nd Cir., 1953); *NLRB v. George P. Pilling & Son Co.*, 119 F. 2d 32 (3rd Cir., 1941). Accordingly, Bethlehem's unilateral abolition, on August 1,

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[*] The holdings in these cases, which designate as "terms and conditions of employment" contract provisions respecting grievance procedures and preferential seniority status, completely demolish Bethlehem's description of its August 1 unilateral action as action concerning mere "Union privileges" (Petition, pp. 8; 17-18; 21; 24).

1959, of the grievance procedure and of the top seniority enjoyed by Union officials and stewards constitutes a violation of Section 8(a)(5) of the Act—a refusal to bargain.

Bethlehem seemingly concedes that the usual rule, as enunciated by this Court, condemns as an unfair labor practice its unilateral action of August 1, 1959. However, Bethlehem reads a defense to this item of its conduct in this Court's opinion in *NLRB v. Insurance Agents' International Union*, 361 U. S. 477 (1960). That defense is this: Bethlehem's unilateral action on August 1, 1959, was not "unilateral action" at all, but was actually a type of "economic pressure" which this Court, in *Insurance Agents'*, held to be consonant with good faith bargaining. The obvious answer to this contention is given by this Court in *NLRB v. Katz*, supra, in which the employer charged with violating Section 8(a)(5) by reason of his unilateral action during negotiations, defended that this unilateral action was protected as "economic pressure" under the *Insurance Agents'* case. In rejecting this contention, this Court stated, at page 747 of *Katz*, that *Insurance Agents'* does not legalize "behavior [unilateral action] which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion . . ." (Thus, for example, if, in *Insurance Agents'*, the respondent union had engaged in mass picketing, secondary boycotts, or other conduct prohibited by Section 8(b) of the Act, the fact that such conduct might have constituted "economic pressure" would not have made that unlawful conduct lawful.)

If further authority is needed for this obvious proposition, we cite *NLRB v. Erie Resistor Corp.*, 373 U. S. 221 (1963), where this Court, at p. 224 of its opinion, designated the employer's grant of super-seniority to employees hired in replacement of strikers as an act which put the union under "great pressure" but nonetheless held that this conduct violated Sections 8(a)(3) and 8(a)(5) of the Act. So,

here, if the form of Bethlehem's "economic pressure" violates the law, there is nothing in *Insurance Agents'* that immunizes Bethlehem from the effect of this violation.

Bethlehem's further defense of its unilateral action of August 1, 1959, is allegedly based on this Court's opinions in *Katz* and *Crompton-Highland*, supra, cases cited by the court below. Bethlehem finds in these cases a broad rule to the effect that unilateral action, otherwise unlawful, is excused upon an employer's affording to the bargaining agent notice of, and an opportunity to bargain with respect to the action. At page 19 of its Petition, Bethlehem goes so far as to say that this Court's condemnation of employer unilateral action in *Katz* and *Crompton-Highland* "*hinged* on lack of notice to, or consultation" with, the bargaining representative prior to the institution of the changes." We find no support in these cases for the broad exception to the usual rule urged by Bethlehem.

However, assuming Bethlehem's construction of *Katz* and *Crompton-Highland* to be sound, this construction can avail Bethlehem nothing. The Court of Appeals in its opinion considered this contention and gave an irrefutable answer to it:

> "But the employer concedes that it was not until July 28, that the Union was notified that these changes were to be effected only three days later. Until this time the Company's [Bethlehem's] own proposed contract included provisions for preferential seniority and a formal grievance procedure. In this setting, it can hardly be said that the Union was given the bargaining

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" Bethlehem fails to point out that in this context, "consultation" means to "bargain . . . concerning changes in the terms and conditions of employment . . ." **NLRB v. Proof Co.**, 242 F. 2d 560, at p. 560 (4th Cir., 1957), cert. denied, 355 U. S. 831. We also desire to make it clear that Bethlehem's use of the disjunctive in the foregoing quotation from its Petition is not accurate; the cases require both notice **and** consultation.

opportunity to which it is entitled under *NLRB v. Katz* . . . and *NLRB v. Crompton-Highland Mills, Inc.*" (App., p. 10).[10]

Moreover, it should be noted that the Union was afforded *no* opportunity to bargain about Bethlehem's intention to take the unilateral action of August 1, 1959. The notification on July 28, of what the Union could expect on August 1, did not take the form (to understate) of an invitation to bargain concerning the subject. As the Trial Examiner noted, Bethlehem simply advised the Union that the changes would be made (34a). This was presented as a *fait accompli;* bargaining on the subject was futile, particularly in light of the fact that Bethlehem had habitually violated the Act by the same type of conduct in its prior negotiations with this Union, despite the Union's protests (536a-537a).

From the foregoing, we see that under the unanimous case authorities, Bethlehem's unilateral action of August 1, 1959, constituted a violation of Section 8(a)(5) of the Act and the Board and the Court of Appeals correctly so held.

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[10] Nothing in the opinion of the court below precludes the Board from considering, in the proceedings to be conducted by the Board pursuant to that court's order remanding the case, the **question of fact** raised by Bethlehem's contention that, under the circumstances, the July 28 announcement of the August 1 unilateral action afforded to the Union "ample opportunity . . . to bargain" (Petition, p. 19) concerning that action. Since the Board has accepted remand of this case, it is submitted that Bethlehem's contention in this regard does not afford a basis on which certiorari should be granted.

III.

THE COURT OF APPEALS CORRECTLY HELD THAT, BY REASON OF BETHLEHEM'S IMMEDIATELY PRECEDING UNFAIR LABOR PRACTICES, THERE WAS, ON AUGUST 11, 1959, NO BONA FIDE IMPASSE IN THE BARGAINING AND THAT, ACCORDINGLY, BETHLEHEM'S UNILATERAL IMPOSITION OF THE WHITE BOOK ON AUGUST 13 CONSTITUTED AN UNFAIR LABOR PRACTICE AS A MATTER OF LAW.

In both of its opinions, the Board held that, since the bargaining, by August 11, 1959, had reached a state of "impasse", Bethlehem was legally justified in unilaterally imposing upon its employees, on August 13, the changes in wages and working conditions set forth in the White Book. The court below held, contra to the Board, that, by reason of Bethlehem's unfair labor practices immediately preceding August 11 the bargaining may not be said to have resulted in a bona fide impasse and that, accordingly, Bethlehem's unilateral imposition of the White Book constituted, as a matter of law, a violation of Section 8(a)(5).

In Point III of its Petition, Bethlehem criticizes on five grounds this holding of the court below. As we shall now see, none of these criticisms of the lower court's holding has any merit or can survive analysis.

1. The court below did not invade the Board's province of fact finding.

Bethlehem argues (Petition, pp. 21 and 22) that, since the Board did not find Bethlehem guilty of "subjective bad

faith", the lower court's conclusion that Bethlehem's unilateral imposition of the White Book violated Section 8(a)(5) constituted a reversal of the Board's finding concerning Bethlehem's state of mind in the negotiations and was, hence, a holding contra to the rule of *Universal Camera Corp. v. NLRB*, 340 U. S. 474.

The fatal fault in Bethlehem's logic in this regard is that it proceeds on the unfounded premise that only where an employer is guilty of "subjective bad faith" in bargaining may his unilateral alteration, during the bargaining, of his employees' working conditions constitute a violation of Section 8(a)(5). Whatever doubt there may have been on this head was laid to rest by this Court's opinion in *NLRB v. Katz*, supra, where the precise issue on which certiorari was granted and to which this Court gave its answer was the issue now raised by Bethlehem.

This Court held in *Katz* that an employer's unilateral alteration of his employees' terms and conditions of employment during contract negotiations, and prior to an impasse, is tantamount to a flat refusal to bargain in fact, and that where such conduct is present, "there is no occasion to consider the issue of good faith", since such conduct "violates Section 8(a)(5) though the employer has every desire to reach agreement and earnestly and in all good faith bargains to that end." Thus, under *Katz*,[11] the court below had no need to—and, as we shall now show, did not—reach or pass upon or modify the Board's holding that it could not ascribe subjective bad faith to Bethlehem.

The court below held that *Katz* was applicable to this

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[11] **Borg-Warner**, as Bethlehem concedes in the first full paragraph of page 21 of its Petition, holds identically with **Katz**, in that, to quote Bethlehem, "this Court held **that** an employer could be found guilty of refusing to bargain **regardless of his good faith**, where he, in effect, refused to bargain over the mandatory subjects". (Bethlehem's emphasis)

case, because here, as in *Katz*, there was no impasse in the sense of a deadlock that would excuse Bethlehem's unilateral actions of August 13. The reason for this holding was that under the authorities and under the dictates of common sense (App., p. 12), a deadlock in negotiations during which the employer has violated the rules of good faith bargaining, as laid down in Sections 8(a)(5) and 8(d), cannot afford a justification for the employer's refusal to bargain further by unilaterally changing his employees' working conditions. Since the Board had found that the unilateral changes of August 1 and Bethlehem's insistence on the grievance-signing proposal did, as a matter of law, constitute violations of the duties imposed upon Bethlehem by Sections 8(a)(5) and 8(d), and since Bethlehem "had . . . not purged itself of its earlier violations" (App., p. 13), any deadlock that may have occurred in Bethlehem's negotiations with the Union did not constitute a good faith impasse that would justify or exculpate Bethlehem's imposition of the White Book upon its employees.

Merely to state this holding of the court below is to see that it is not grounded on Bethlehem's subjective bad faith or, indeed, on any other question of fact. Accordingly, the rule of *Universal Camera Corp.* is utterly inapposite to the issues properly presented by Bethlehem's Petition.

2. The court below did not apply a per se rule of law in holding that since the alleged deadlock in negotiations was preceded by conduct violative of Section 8(a)(5), Bethlehem's unilateral actions of August 13 were, therefore, not excused by a bona fide impasse.

Bethlehem argues (Petition, pp. 22-23) that in *Insurance Agents'* this Court enunciated a policy condemning *per se* rules of law and that the court below went counter to this

policy and applied a *per se* rule of law in concluding that Bethlehem, by violating Section 8(a)(5) prior to August 11, as the Board had held, prevented the alleged deadlock from being an impasse that would exculpate Bethlehem's unilateral imposition of the White Book on August 13. This argument suffers from two fatal defects.

In the first place, the court below applied no *per se* rule *of law*. Under the weighty authorities cited by the court below (App., p. 12), a deadlock exculpates unilateral action only if that deadlock is preceded by, and results despite, good faith bargaining, i.e., bargaining conduct which is conformant to the requirements of Sections 8(a)(5) and 8(d). With ample support in the record, the Board held that Bethlehem's unilateral changes in working conditions on August 1, and its insistence on the grievance-signing provision, constituted violations of Section 8(a)(5). It is obviously a *per se* rule of logic and common sense—rather than of law—that it is impossible to say that a party, while committing a violation of Section 8(a)(5), simultaneously conformed to the mandates of Section 8(a)(5). Thus, the court below was merely applying the inescapable dictate of common sense and logic expressed in the unanimous cases and authorities relied upon by it and which do no more than apply the time-honored equitable rule that a party may not profit or gain advantage—here, impunity for unilateral action—from his own unlawful acts.

In the second place, this Court's opinions not only fail to disclose a policy condemning what Bethlehem deems to be "per se rules" in judging whether conduct conforms to the standards of Sections 8(a)(5) and 8(d), but, indeed, enunciate a contrary policy. Without using the phrase "per se", this Court has consistently announced and abided by the view that certain conduct, in and of itself, is so inconsistent with the statutory duty to bargain as conclusively to constitute a violation of that duty. We need go

no further than the *Katz* case, where this Court held that irrespective of the employer's "good faith", his unilateral action constituted conduct so "contrary to the Congressional policy" as to "amount to a refusal to negotiate"—a violation of Section 8(a)(5) (*Katz*, p. 747).

And in *NLRB v. Erie Resistor Corp.*, 373 U. S. 221 (1963), a case decided late last term, this Court held that notwithstanding the employer's innocent, economic motivation, the unfair labor practice defined in Section 8(a)(3) of the Act had been committed when the employer, pursuant to that innocent motivation, granted super-seniority to employees hired in replacement of strikers and to employees who refrained from striking.[12]

3. The court below did not condition the privilege of unilateral action upon lack of prior violations of Section 8(a)(5).

Bethlehem contends, in effect (Petition, p. 24), that the court below has enunciated a *per se* rule that, in every case, an employer is prohibited from taking unilateral action where, prior to that action, he has violated Section 8(a)(5).

Nothing in the opinion of the court below can properly be so construed. What the court plainly held is this: the violations of Section 8(a)(5) persisted in by Bethlehem, as the Board found, up to and including August 13, 1959, precluded a holding that Bethlehem's conduct of the bargaining had conformed to the requirements of Section 8(a)(5), with the consequence that any deadlock allegedly

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[12] **Borg-Warner, Crompton-Highland Mills** and **May Department Stores** are other cases in which this Court sustained findings that Section 8(a)(5) had been violated irrespective of the employer's "bad" or "good faith".

reached could not constitute an impasse of such nature as normally excuses unilateral action.[13]

In this connection, it is to be noted that contra to the impression which may be gleaned from Bethlehem's statement of its contention, this is not a case in which an employer has committed an unfair labor practice; has thereafter rescinded or neutralized the acts constituting the unfair labor practice; and then, later, asserts a bona fide impasse as a defense to his unilateral action. In this case, Bethlehem never withdrew its grievance-signing proposal but, as its Petition concedes at page 14, tenaciously insisted upon obtaining it in the bargaining sessions both before and after August 11, 1959, the date of the alleged impasse. The same is true of Bethlehem's unilateral actions of August 1: Bethlehem never rescinded or eradicated the effects of its abolition of super-seniority and of the grievance procedure, including arbitration, set forth in the 1956 contract.

Under these circumstances—where an employer persists in violations of Section 8(a)(5) right up to the date of the alleged impasse, i.e., where the violations are simultaneous with the unilateral action—settled doctrine compelled the lower court to hold that there was no bona fide impasse in the sense in which the authorities use that term, and that, accordingly, Bethlehem's unilateral imposition of the White Book constituted a violation of Section 8(a)(5) as a matter of law. This is a far cry from a holding that, under all circumstances, an employer's privilege of unilateral action

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[13] The cases cited by Bethlehem at page 24 of its Petition do not propound a contra rule and do not say that an employer may always take unilateral action after "the Union has been given notice and opportunity for bargaining" (Petition, p. 23). In **NLRB v. Bradley Washfountain Co.**, the Court of Appeals for the Seventh Circuit concluded that the employer's grant of a wage increase was not "unilateral". In the other four cases, the Board reiterated the firmly entrenched rule that the existence of a bona fide impasse is the legal precondition to employer unilateral action.

is conditioned "upon lack of *prior* violations" of Section 8(a)(5) (Petition, page 23).

4. Bethlehem did not give the Union adequate notice of, or opportunity to bargain about the unilateral imposition of the White Book.

At pages 23-24 of its Petition, Bethlehem defends its imposition of the White Book on the ground that the Union was given notice of and an opportunity to bargain concerning Bethlehem's unilateral actions of August 13. Assuming, *arguendo*, that such notice and opportunity to bargain would excuse an employer's unilateral action which has effects as all-pervasive as those flowing from the imposition of the White Book, such a rule of law cannot aid Bethlehem here.

On August 11, 1959, Bethlehem announced to the Union negotiators its intention to impose the White Book a mere two days thereafter (545a, par. 25; 843a-847a). This notice was given and the White Book was put into effect despite the fact that the parties' preliminary review of their respective proposals had not yet, by August 11, touched upon a substantial number of very important proposals (161a-165a; 168a; 749a-758a; 823a-841a).[14] Accordingly, Bethlehem afforded to the Union absolutely no opportunity to bargain concerning a substantial number of substantive provisions in the White Book, let alone a reasonable opportunity to bargain concerning Bethlehem's intention to impose upon the employees on August 13 *all* of the provisions set forth in the White Book.

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[14] Among these were the Union's proposals for additional paid holidays, an improved insurance program, a liberalized pension program, increases in wages, and the addition of new so-called "premium rates"; and Bethlehem's proposals respecting division of work, assignment of work, a new method of computing holiday pay, and the rescheduling of shifts.

Moreover, no negotiation session was scheduled or held on August 12. On August 13, the White Book was imposed. Accordingly, Bethlehem gave the Union but one full day's notice of its intention to take the drastic unilateral action it effectuated on August 13. As the court below concluded concerning Bethlehem's contention that it had given the Union "notice and opportunity to bargain" preceding the more limited unilateral action of August 1, ". . . it can hardly be said that the Union was given the bargaining opportunity to which it is entitled under *NLRB v. Katz* . . . and *NLRB v. Crompton-Highland Mills, Inc.*" (App., p. 10). The irrevocability of Bethlehem's intention to impose the White Book on August 13, and the denial to the Union of any opportunity to bargain about the matter, are made further manifest by the fact that Bethlehem on August 11 posted notices in all of its shipyards "to all hourly-paid employees represented by the [Union]" advising the employees that on August 13 they would start working under the worsened terms and conditions set forth in the White Book (545a, par. 26-547a).

5. Bethlehem's violations of Section 8(a)(5) preceding August 13 were so serious in nature as to make it inconsistent with Section 8(a)(5) to hold that the imposition of the White Book was excusable.

At page 25 of its Petition Bethlehem argues that because the violations of Section 8(a)(5) of which the Board had found it guilty were "not serious", the lower court erred in holding that the commission of, and persistence in these violations negated an impasse that would exculpate Bethlehem's unilateral action of August 13. The footnote on that page of the Petition would indicate that Bethlehem is here restating an argument made by it at page 14 of the Petition.

namely, that the lower court's holding was in error because Bethlehem's insistence on the grievance-signing proposal—as well, we suppose, as its commission of, and persistence in, its unilateral actions of August 1—were not the cause of the deadlock upon the mandatory subjects of bargaining which were in issue in the negotiations.

For a number of reasons, this contention presents no reason supporting the grant of certiorari.

(a) None of the case authorities holds that violations of Section 8(a)(5) during negotiations must be the cause—or even a cause—of a deadlock, in order to prevent such deadlock from being deemed an impasse which excuses unilateral action. The settled rule appears to be that where uncured violations of Section 8(a)(5) occur during bargaining, a deadlock in the bargaining cannot excuse unilateral action. This rule derives from another rule, namely, that only an impasse arising during bargaining which conforms to the mandates of Section 8(a)(5) may be deemed to make further bargaining useless and, hence, to justify unilateral action.[15] The rule thus laid down by the cases is supported by reason and the realities of collective bargaining as well as by legal logic.

To hold that violations of Section 8(a)(5) committed during bargaining must have been the cause of a deadlock in order to prevent the deadlock from being deemed an im-

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[15] **NLRB v. Yutana Barge Lines, Inc.**, 315 F. 2d 524, 529-530 (9 Cir., 1963); **Carpinteria Lemon Assn. v. NLRB**, 240 F. 2d 554 (9 Cir., 1956); **Reed & Prince Mfg. Co. v. NLRB**, 205 F. 2d 131 (1 Cir., 1953); **City Packing Co.**, 98 NLRB 1261 (1952); **NLRB v. Andrew Jergens Co.**, 175 F. 2d 130 (9 Cir., 1949). In **Vanette Hosiery Mills**, 114 NLRB 1107 (1956) and in **Reed & Prince Mfg. Co.**, 96 NLRB 850 (1951), the Board found that the responsibility for the deadlock was attributable to the employer's lack of good faith; however, the Board did not hold that such finding was necessary in order to deprive the deadlock of the character of an impasse which would exculpate the employer's unilateral action.

passe which excuses unilateral action would introduce guess and conjecture into the determination of whether unilateral action is permissible or not. In so emotion-fraught and potentially explosive a human activity as collective bargaining, what will or will not cause a deadlock, what is or is not an important issue, what effect one party's position or action on an issue will have on the other party—all these are necessarily matters of conjecture, since they cannot be appraised with any degree of certainty. The only way of discouraging the utilization of bargaining strategy or techniques that skirt as closely as possible to violations of Section 8(a)(5), the only way of discouraging the parties from gambling on what the Board and the courts will hold to be important or unimportant issues or violations of Section 8(a)(5), is to adhere to the rule that any unremedied violation of Section 8(a)(5) during bargaining that ends in a deadlock will prevent that deadlock from being a defense to unilateral action.

(b) Assuming, *arguendo*, that the law were to the contrary, the pronouncements of this Court seem to make it quite clear that because of the character of the violations of Section 8(a)(5) which Bethlehem committed and persisted in, those violations were necessarily at least a greatly contributing cause of the alleged deadlock in this case.

The following are this Court's expressions respecting an employer's unilateral action during collective bargaining:

May Department Stores Co. v. NLRB, 326 U. S. 376, 385 (1945):

> "Such unilateral action minimizes the influence of organized bargaining. It interferes with the rights of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

In *NLRB v. Crompton-Highland Mills, Inc.*, supra, at pages 221-222, where the employer unilaterally granted bet-

ter working conditions, rather than, as in our case, imposing worsened working conditions, this Court approved the following statement by the Board:

> "In our opinion, such action taken so soon after the Union was attempting through the bargaining process to reach an agreement . . . clearly *shows that the Respondent was not acting in good faith during the negotiations, and is manifestly inconsistent with the principle of collective bargaining.*" (Emphasis supplied by Court.)

NLRB v. Insurance Agents' International Union, supra, at page 485:

> "For example, an employer's unilateral wage increase during the bargaining processes tends *to subvert the Union's position as a representative of the employees* in matters of this nature, and hence has been condemned as a practice violative of this statutory provision. See *Labor Board v. Crompton-Highland Mills, Inc.*, 337 U. S. 217." (Emphasis supplied.)

NLRB v. Katz, supra, at page 747:

> "Unilateral action by an Employer without prior discussion with the Union does amount to a *refusal to negotiate* about the affected conditions of employment under negotiation, and must of necessity *obstruct bargaining, contrary to the Congressional policy.* It will often disclose an unwillingness to agree with the Union. It will rarely be justified by any reason of substance. It follows that the Board may hold unilateral action to be an unfair labor practice in violation of Section 8(a)(5), without also finding the employer guilty of overall subjective bad faith." (Emphasis supplied.)

This Court's condemnation of an employer's insistence upon a non-mandatory subject of bargaining has been even more severe. At page 350 of *Borg-Warner*, supra, this Court spoke as follows respecting the "ballot" clause there in issue, a clause which is clearly analogous to Bethlehem's grievance-signing proposal:

> "... the ... clause ... substantially modifies the collective bargaining system provided for in the statute *by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative.*" (Emphasis supplied.)

And, at page 349 of the *Borg-Warner* opinion, this Court spoke as follows concerning the effect, generally, of an employer's insistence that a collective bargaining agreement contain a provision respecting a non-mandatory subject of bargaining:

> "We agree with the Board that such conduct is, in substance, *a refusal to bargain about the subjects that are within the scope of mandatory bargaining.*" (Emphasis supplied.)

It would seem obvious that bargaining tainted, as was Bethlehem's, by violations of Section 8(a)(5) of so basic a nature must of necessity have been either the cause, or a significantly contributing cause to any deadlock in the negotiations and, therefore, necessarily prevented such deadlock from being, either in law or in common sense, an impasse following good faith bargaining and excusing Bethlehem's all-pervasive unilateral change of working conditions on August 13.

(c) Still assuming, *arguendo*, that Bethlehem's contention is correct, and that there must be a finding that the

violations of Section 8(a)(5) committed by Bethlehem caused the alleged deadlock, before it may be held that the unilateral imposition of the White Book was also a violation of Section 8(a)(5); and assuming, further, that this Court's condemnation of the kind of violations of Section 8(a)(5) which Bethlehem committed does not warrant the finding of such a causal connection, then Bethlehem's Petition is premature for the following reasons.

Neither the Trial Examiner nor the Board made any finding as to the effect of Bethlehem's unilateral actions of August 1 upon the possibility of the parties reaching agreement. The Trial Examiner did opine, however, that "the impasse was not materially affected by" Bethlehem's insistence upon its grievance-signing proposal (75a). Obviously, this leaves ample room for the conclusion that the impasse was, at least in some degree, caused by this particular violation of Section 8(a)(5). Whether the Board agreed with this recommended finding cannot be ascertained because the Board, both in its original Decision and Order and in its Supplemental Decision and Order, pointedly announced that it was not completely agreeing with all of the Trial Examiner's subsidiary findings (84a, 95a), without, however, specifying these subsidiary findings. Accordingly, the lower court's remand, and the Board's acceptance thereof, should be left undisturbed so as to give the Board an opportunity to make findings on these matters, if such findings are deemed necessary to a determination of whether Bethlehem's imposition of the White Book was a violation of Section 8(a)(5).

CONCLUSION.

For all of the foregoing reasons, the Union respectfully submits that Bethlehem's petition for a writ of certiorari should be denied.

Respectfully submitted,

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